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SUPREME COURT OF THE UNITED STATES

October Term 1967

No. 1293

FRED CHERRY, ET AL., PETITIONERS

v.

THE POSTMASTER GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' REPLY AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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This reply brief also contains intervening matters that were not available in time to have been included in the petition for certiorari and is therefore designated as a reply and supplemental brief.

I

In a footnote at page 6 of their memorandum in opposition, the respondents state that: "Moreover 39 C.F.R. 953.17 provides that a party whose matter has been found to be nonmailable may apply to the Judicial Officer for its return. Cherry has never exhausted that available administrative remedy." This is correct. However 39 C.F.R. 953.17 (reproduced at page 10a of the petition for certiorari) refers to "matter found to be nonmailable." An application under this provision might be construed as a concession that the post cards in question are indeed nonmailable so as to waive all constitutional claims to the contrary. Therefore petitioners feel that such an application might be premature at this time. However, if this petition for certiorari is denied, the sender will make application for the return of the post cards and if said application is denied the sender will petition this Court for a rehearing of its denial of certiorari.

II

Petitioners, on page 15 of their petition for certiorari, have argued as follows:

> The respondents may argue, as they have argued previously, that the Post Office Department has the power to censor the truth involving matters of general public concern appearing on the outside surface of newspapers and magazines, but they have *not* argued, nor can they argue, that they have actually *exercised* this power in modern times. If their claim were really valid, then the least they ought to do now is to cite a few cases in which magazines or newspapers were denied mailing privileges for the "crime" of revealing the truth involving matters of general concern, merely because said truth reflected injuriously upon the character or conduct of public figures.

It should be noted that, on pages 5-6 of their brief, the respondents are *still* arguing that the Post Office Department has this power and it should be further noted that they are *still* unable to cite a single case in which this power has actually been *exercised* in modern times. It can also be argued that the Queen

of England has the power to veto legislation. Similarly, however, no English monarch has attempted to exercise said power in modern times. If the Post Office Department dared to suppress a newspaper on the same grounds that they have suppressed petitioner's post cards, there would be such a hue and cry raised that the Post Office Department would never again be in a position to abridge *anyone's* First Amendment rights. But when the rights of an individual are denied—particularly an individual who has no influential organizations backing him—then no one seems to object, except (hopefully) this Court.

III

The respondents, in a footnote at page 5 of their brief, argue that: "In this connection we note that petitioners' contention that Reverend Wood is a "public figure" was raised for the first time in oral argument before the court of appeals." It is true that the petitioners did not previously allege, *in precisely those terms*, that the Reverend Wood is a public figure. It must be considered that the complaint was filed in the district court before the decision in the case of *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, was announced by this Court. However, in the proceedings before the district court, the petitioners did make allegations which are legally equivalent to the "public figure" designation, and in addition alleged facts from which it must be legally concluded that the Reverend Wood is a public figure. After all, exactly what is a "public figure"? In *Pauling* v. *Globe Democrat Publishing Company*, 362 F.2d 188, 196, the Court of Appeals for the 8th Circuit held that: "A lobbyist, a person dominant in a political party, the head of any pressure group, or any significant leader may possess a capacity for influencing public policy as great or greater than that of a comparatively minor public official. . . . It would seem, therefore, that if such a person seeks to realize upon his capacity to guide public policy and in the process is criticized, he should have no greater remedy than does his counterpart in public office." This seems to be a satisfactory definition of a "public figure." Similarly, the petitioners have alleged, in the proceedings before the district court, that the information contained on the post cards is true; is of general political, religious, and sociological significance;

and is fair comment upon the conduct of persons in respect of public affairs. (See petition for certiorari, page 27a.) Furthermore, the very facts on the post cards themselves, if taken as true, are enough to lead to the conclusion that the Reverend Wood is a public figure. In addition, the facts alleged in the "Request for Admission of Facts" which is reproduced on pages 41a-48a of the petition for certiorari, support the conclusion that the Reverend Wood is a public figure.

All of the foregoing argument concerning the "public figure" designation should not be permitted to obscure a more basic issue. The more basic issue being whether or not speech which is true; and is of general political, religious, and sociological significance; and is fair comment of persons in respect of public affairs; is, in general, protected from suppression by the First Amendment. The petitioners have certainly raised and preserved this more basic issue properly. ((See, in addition, petitioners' brief before the court of appeals, pages 8-13.) This Court has recently held that erroneous criticism of public figures is protected by the First Amendment. Cf. *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130. However, this Court also held, for a long period of time, that truthful criticism involving matters of public concern is also protected by the First Amendment. (See, for example, petitioners' brief before the court of appeals, pages 8-13.)

The petitioners, at this point, would like to mention some matters that were not available in time to be included in the petition for certiorari. This material is intended to further demonstrate that the information on the post cards in question is of general political, religious, and sociological significance. The material referred to appears in the December '67 issue of a publication called "Social Action." Said publication is one of two monthly publications issued by the United Church of Christ. The World Almanac for 1968, page 180, states that the United Church of Christ has over two million members and "is active in Christian education . . . mass communications . . . and social action." The aforementioned December '67 issue of the publication "Social Action" is entirely devoted to glorifying and exalting homosexuality. This issue contains, among other items,

an "annotated bibliography, prepared by the Rev. Robert Wood and a committee of UCC pastors." Said bibliography contains a plug for the book, "Christ and the Homosexual," by Robert W. Wood, mentioning that said book is the "Winner of two Awards-of-Merit." Said bibliography also contains plugs for two other works of the Reverend Wood, including a republication of the sermon mentioned at page 50a of the petition for certiorari. Said bibliography further contains a criticism of "Homosexuality and Citizenship in Florida," a report of the Florida Legislative Investigation Committee. (See petitioners' brief before the court of appeals, page 10.) Said criticism states that: "This piece of pornography, which actually carries the great seal of the State of Florida, is included to show to what depths a legislative investigation committee will go in a witch hunt of homosexuals." This last item is mentioned to demonstrate that the leaders of the organized homosexual movement of America also engage in attacks upon reputation.

The aforementioned December '67 issue of "Social Action" also contains a nine-page article by Mr. Richard Leitsch, President of the Mattachine Society of New York. For a description of the Mattachine Society of New York, see pages 41a-48a and 50a of the petition for certiorari. Said article of Mr. Leitsch states, *inter alia*, that: "Through the efforts of the Mattachine Society of New York, the New York City police were forbidden in April 1966 to make arrests for homosexual "solicitation" without a complaint signed by a private citizen, other than a police officer. . . . The City has been able to reassign to more constructive duties the several hundred police officers formerly used as decoys to apprehend homosexuals." This policy, of course, affects homosexual prostitutes as well as homosexual non-prostitutes. To understand exactly what Mr. Leitsch means by "more constructive duties" it is necessary to refer to page 19 of the New York Times of 9/17/66. An article on that page states that: "Arrests for prostitution in the city have reached their highest point in at least 10 years because of a police clean-up campaign in the midtown area. . . . Teams of plainclothesmen were sent to Times Square, Eighth Avenue, Central Park South and Lexington Avenue near the Fifties. Many of these

plainclothesmen were previously used to trap homosexuals. That practice ended in April on orders of Chief Inspector Sanford D. Garelik after the department decided it was an infringement on the homosexuals' civil liberties." (i.e., Homosexuals, both prostitute and non-prostitute, have civil liberties. Women prostitutes do not.) The Times article makes it clear that this crackdown involves only women when it further states: "In arresting streetwalkers, the police insist that there is no one area where the *women* [emphasis supplied] gather."

All of the foregoing material has been included in this brief to show that: (1) the organized homosexual movement of America has taken over the United Church of Christ, at least to the extent that said movement has prevailed upon that denomination to devote an entire issue of one of its two periodicals to pro-homosexual propaganda; and (2) a leader of the organized homosexual movement of America openly boasts that said movement has prevailed upon the City of New York to engage in a deliberate policy of discriminatory law enforcement favoring the growth of homosexuality. To show that this policy of discriminatory law enforcement favors the growth of homosexuality, see "Live and Let Live" by Dr. Eustace Chesser; and "Prostitution and Morality" by Benjamin & Masters. These books are mentioned on the very post card which is the subject of this action and is reproduced on pages 35a-36a of the petition for certiorari.

The purpose of the foregoing material is to show this Court that not only do the petitioners have the right to disseminate the information and opinion on the post cards in question, but that there is a positive *need* that this information and opinion be made available to the public. It has been said that freedom of speech does not include the right to cry "fire" in a crowded theater. However, if there actually *is* a fire, then one not only has the right, but also the duty, to warn the theatergoers of the danger.

IV

The respondents, in a footnote at page 5 of their brief, state that: "The instant case also does not involve any question as to the scope of a libel action against a "public official" or

"public figure" under the doctrine of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, and *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130." In a sense this statement is correct. This is *not* a private suit for libel, but rather a governmental action to suppress a publication under a *criminal* libel statute in which truth is no defense. The issues in this case more closely resemble the issues in *The Trial of John Peter Zenger*, 17 Howell's St. Tr. 675 (1735). The *Zenger* case overruled a number of precedents of the notorious British Court of the Star Chamber.

Respectfully submitted

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&

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